Supreme Court, U.S.
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No. 98-1829

In The

Supreme Court of the United States

ORTHO BIOTECH, INC.,

Petitioner,

v.

OLIVER MEDLOCK, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. The Tenth Circuit's Ruling That Damages For "Loss of Future Compensation" Are Not Subject To The Statutory Cap Under Title VII Does Not Reflect A Significant Conflict Among The Circuit Courts of Appeals 2

A. The Tenth Circuit Has Historically Regarded Damages For "Loss Of Future Compensation" As Front Pay, Constituting Equitable Relief Under Title VII 2

B. A Substantial Majority Of The Circuit Courts of Appeals Have Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII 4

C. Even The Sixth Circuit Has Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII 5

II. The Instant Case Does Not Present An Appropriate Opportunity For Resolving When A Plaintiff Has Presented Sufficient Evidence To Take Advantage Of The *Price Waterhouse* Mixed-Motive Proof Scheme 7

III. The Question Concerning The Extension Of The After-Acquired Evidence Rule Set Forth In *McKennon v. Nashville Banner Publ'g Co.* Is Not Important Enough To Warrant Review 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 873 (1999) 8

EEOC v. General Lines, Inc., 865 F.2d 1555 (10th Cir. 1989) 5

Equal Employment Opportunity Comm'n. v. Enterprise Association Steamfitters, Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977) 5

Fite v. First Tennessee Production Credit Ass'n, 861 F.2d 884 (6th Cir. 1988) 6

Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980) 3

Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984) 5

Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 64 (1998) 5, 6, 7

James v. Stockham Valves & Fitting Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) 5

Kramer v. Logan County School District No. R-1, 157 F.3d 620 (8th Cir. 1998) 5

McCue v. State of Kan., Dept. of Human Resources, 165 F.3d 784 (10th Cir. 1999) 4

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) 10, 11

Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986) 5

Pitre v. Western Elec. Co., Inc., 843 F.2d 1262 (10th Cir. 1988) 3

TABLE OF AUTHORITIES – Continued

Page

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....8, 9

Roush v. KFC Nat. Management Co., 10 F.3d 392 (6th Cir. 1993) 6

Scarfo v. Cabletron Sys., Inc., 54 F.3d 931 (1st Cir. 1995)..... 5

Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995) 7

Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985) 5, 7

Spears v. Board of Educ. Of Pike County, Ky., 843 F.2d 882 (6th Cir. 1988)..... 7

Suggs v. ServiceMaster Educ. Food Management, 72 F.3d 1228 (6th Cir. 1996)..... 6

Thomas v. National Football League Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997)..... 8

Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) 5

Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986)..... 5

Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991) 5

STATUTES

29 U.S.C. § 621..... 6

42 U.S.C. § 1981a(b)(2)..... 3

42 U.S.C. § 2000e-5(g) 3, 4, 5

STATEMENT OF THE CASE

The statement of the case submitted by the petitioner, Ortho Biotech, Inc. ("OBI"), omitted the following material facts.

In December of 1993, the respondent, Oliver Medlock, Jr., filed administrative charges with the Equal Employment Opportunity Commission, alleging among other claims that his compensation was the product of racial discrimination. A-4. In June of 1995, Mr. Medlock was deposed in the present case. During his deposition, Mr. Medlock testified about his allegations of race discrimination, including his claim of unequal compensation based upon his race. A-7. About one month later, Mr. Medlock received a letter from OBI's Human Resources Director, Marilyn Thompson. Ms. Thompson's letter informed Mr. Medlock that he was being suspended "[a]s a result of issues raised in your deposition." A-55. At trial, Ms. Thompson admitted that she had investigated Mr. Medlock's administrative charges, and that she was aware Mr. Medlock's allegations in this case included a claim of unequal compensation based on his race.

In August of 1995, Mr. Medlock received a letter from OBI's President, Carol Webb, informing Mr. Medlock that he was being discharged from his employment. A-56 to A-60. Ms. Webb's letter set forth the ostensible reasons for Mr. Medlock's termination, the first of which was that: "During the entire term of your employment, you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management and Ortho Biotech human resources personnel." A-56. At trial, Ms.

Webb admitted that she had read Mr. Medlock's deposition prior to his discharge. Ms. Webb further admitted that she was aware of Mr. Medlock's claim that his compensation was the result of racial discrimination.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Ruling That Damages For "Loss of Future Compensation" Are Not Subject To The Statutory Cap Under Title VII Does Not Reflect A Significant Conflict Among The Circuit Courts of Appeals.

The first question on which OBI seeks a grant of certiorari is whether the award of damages for "loss of future compensation" is subject to the statutory cap under Title VII. Resolution of this question turns on whether an award of front pay constitutes equitable relief under Title VII.

A. The Tenth Circuit Has Historically Regarded Damages for "Loss of Future Compensation" As Front Pay, Constituting Equitable Relief Under Title VII.

The jury in this case awarded Mr. Medlock "[f]uture damages" sustained as a result of retaliation by OBI for Mr. Medlock's filing and pursuing charges of race discrimination. A-52. The Tenth Circuit construed this award as an award of front pay only, since the award consisted solely of "future loss of compensation." A-20 to A-21, n. 8. Prior to the 1991 amendments to Title VII, the Tenth Circuit had consistently regarded front pay as a type of

"other equitable relief" authorized by § 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]. See, e.g., *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1276 (10th Cir. 1988); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 956-57 (10th Cir. 1980).

Because the Tenth Circuit has historically regarded front pay as a type of "other equitable relief" authorized by Title VII, the circuit court here concluded that the award of front pay fell within the broad exemption from the cap on awards of "compensatory damages" set forth in the 1991 amendments to Title VII. This exemption is contained in 42 U.S.C. § 1981a(b)(2), which states:

> Compensatory damages under this section shall not include back pay, interest on back pay, or *any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].*

Emphasis added.

In its petition for a writ of certiorari (p. 14), OBI contends that the award of front pay here cannot be characterized as "equitable relief," since Mr. Medlock did not seek reinstatement, and since the award of front pay was made by the jury rather than the district court. Both of these arguments must fail. As to the failure to seek reinstatement, the circuit court here correctly noted that Tenth Circuit law allows an equitable award of front pay in lieu of reinstatement, even where the plaintiff does not seek reinstatement in the pleadings. See A-22, n. 9, citing *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

As to the award of front pay by the jury, OBI specifically *requested* that the issue of front pay be submitted to the jury. A-41. Mr. Medlock did not object to OBI's request, so the district court submitted the issue to the jury. A-52. If OBI had objected to submitting the issue of front pay to the jury, such an objection would have been meritorious. The Tenth Circuit recently vacated an award of front pay by a jury, holding that "front pay is a form of equitable relief available under 42 U.S.C. § 2000e-5(g), to be awarded by the judge, not the jury." *McCue v. State of Kan., Dept. of Human Resources,* 165 F.3d 784, 791 (10th Cir. 1999). Thus, since OBI here requested that the issue of front pay be decided by the jury and not by the judge, OBI invited the error which it now seeks to use to its advantage. This procedural irregularity makes this case a poor vehicle for reviewing the question of whether front pay constitutes equitable relief under Title VII.

B. A Substantial Majority Of The Circuit Courts Of Appeals Have Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII.

Like the Tenth Circuit, a substantial majority of the circuit courts of appeals have historically regarded front pay as constituting equitable relief under Title VII, prior to the statutory amendments in 1991. Prior to 1991, Title VII only authorized relief in the form of back pay, reinstatement, "or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). This pre-1991 statutory language in § 2000e-5(g) has been interpreted by all of the circuit courts of appeal, with the lone exception of the Seventh Circuit, as authorizing equitable relief

in the form of front pay. See *Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 954 (1st Cir. 1995); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991); *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1561 (10th Cir. 1989); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Pecker v. Heckler*, 801 F.2d 709, 711 (4th Cir. 1986); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3d Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982); *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Equal Employment Opportunity Comm'n. v. Enterprise Association Steamfitters, Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

Because a substantial majority of the circuit courts of appeals have historically regarded front pay as constituting equitable relief under Title VII, the Tenth Circuit's ruling in this case – based on the premise that front pay constitutes "any other type of relief authorized under Section 706(g) [§ 2000e-5(g)]" – does not reflect a significant conflict among the circuit courts sufficient to justify granting OBI's petition.

C. Even The Sixth Circuit Has Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII.

In support of its contention that the circuit court decisions are split over the question of whether front pay constitutes equitable relief under Title VII, OBI cites the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193

(6th Cir. 1997), *cert. denied*, 119 S. Ct. 64 (1998). (Petition at p. 8). In *Hudson*, the Sixth Circuit concluded that an award of front pay is not specifically authorized by Title VII, and therefore such an award is subject to the statutory cap on "compensatory damages." In reaching this conclusion, the Sixth Circuit stated in part:

> [A]s noted above, courts have awarded front pay as an alternative to reinstatement under § 706(g) of Title VII. But, 'front pay' is not specifically 'authorized' by § 706(g) and in the Sixth Circuit, we have treated front pay, in most contexts, as a legal, rather than an equitable, remedy by ruling that, although it is for the court to determine whether front pay is appropriate in lieu of reinstatement, the determination of the amount of any such award is a matter for the jury to decide. *See, e.g. Roush v. KFC Nat. Management Co.*, [10 F.3d 392, 398-400 (6th Cir. 1993)]; *Suggs v. ServiceMaster Educ. Food Management*, [72 F.3d 1228 (6th Cir. 1996)]. *See also, Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884, 893 (6th Cir. 1988).

130 F.3d at 1203-1204.

The above statement in *Hudson* is not an accurate summary of prior decisions by the Sixth Circuit, at least in the context of Title VII. Two of the cases cited in the above quote – *Roush v. KFC Nat. Management Co.* and *Fite v. First Tennessee Production Credit Ass'n* – involved awards of front pay, but the awards were not under Title VII, but rather under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* The third case cited in the above quote – *Suggs v. ServiceMaster Educ. Food Management* – did involve an award of front pay

under Title VII, but the award was in fact made by the court and not by a jury.

As the decision in *Suggs* demonstrates, the Sixth Circuit has consistently treated an award of front pay under Title VII as an equitable remedy, with the amount of the award being determined by the court and not by a jury. See also *Shore v. Federal Exp. Corp.*, 42 F.3d 373, 377-379 (6th Cir. 1994); *Spears v. Board of Educ. Of Pike County, Ky.*, 843 F.2d 882, 886 (6th Cir. 1988); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985). Cf. *Schwartz v. Gregori*, 45 F.3d 1017, 1023 (6th Cir. 1995) [noting that in the context of Title VII, "this court has characterized front pay as an equitable remedy"].

As the above decisions demonstrate, the Sixth Circuit has historically regarded front pay as an equitable remedy under Title VII. Consequently, the conclusion reached in *Hudson* – based on the premise that front pay constitutes a legal remedy under Title VII – stands alone, and is inconsistent even with decisions within the Sixth Circuit. Because of its questionable legal reasoning, *Hudson* does not create a significant conflict among the circuit courts sufficient to merit plenary review by the Supreme Court.

II. The Instant Case Does Not Present An Appropriate Opportunity For Resolving When A Plaintiff Has Presented Sufficient Evidence To Take Advantage Of The *Price Waterhouse* Mixed-Motive Proof Scheme.

The second question on which OBI seeks review concerns the type of evidence necessary to trigger the mixed-motive proof scheme established in this Court's decision

in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Court's decision in *Price Waterhouse* admittedly has caused disagreement among the circuit courts of appeals. A majority of the circuit courts has concluded that in order to take advantage of the mixed-motive proof scheme, the plaintiff must present direct or circumstantial evidence that a discriminatory or retaliatory motive was a substantial factor in the particular employment decision at issue. The Tenth Circuit follows the majority view, and in the instant case held:

> To prevail via this direct method, a plaintiff must introduce direct or circumstantial evidence that the alleged retaliatory motive 'actually relate[s] to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace.' *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997). . . .

A-6.

On the other hand, a minority of the circuit courts has taken Justice O'Connor's concurring opinion as establishing the rule of *Price Waterhouse*. In her concurring opinion, Justice O'Connor stated that "[w]hat is required is . . . direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (O'Connor, J., concurring). The minority of circuit courts has interpreted "direct evidence" to mean non-inferential or non-circumstantial. See, e.g. *Brady v. Fort Bend County*, 145 F.3d 691, 711 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 873 (1999).

The instant case does not present an appropriate opportunity for resolving the conflict between the circuit courts arising from the interpretations of *Price Waterhouse*. The instant case is not an appropriate vehicle for resolving this question because the evidence of retaliation here satisfies even the strict interpretation of "direct evidence."

As discussed above, in her concurring opinion in *Price Waterhouse*, Justice O'Connor stated that in order to trigger the mixed-motive proof scheme, "[w]hat is required is what Ann Hopkins showed here: direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (O'Connor, J., concurring). However, in *Price Waterhouse*, Ms. Hopkins did not show that the decision makers who denied her a partnership ever actually admitted, or stated expressly that their decision was based on her gender. Rather, what Ms. Hopkins showed was gender-related, stereotyping comments made by some partners, which suggested that gender played a role in their decision. 490 U.S. at 235-237.

The evidence of retaliation which Mr. Medlock presented in the instant case was at least as "direct" as the evidence of discrimination which Ms. Hopkins presented in *Price Waterhouse*. Mr. Medlock presented evidence of two statements by decision makers, which placed substantial negative reliance on Mr. Medlock's opposition to what he believed to be racial discrimination.

Both of these statements were made after Mr. Medlock had testified in his deposition that his unequal compensation was the product of racial discrimination. The

first statement by a decision maker was the letter from Marilyn Thompson, OBI's Human Resources Director, notifying Mr. Medlock that he was being suspended "[a]s a result of issues raised in your deposition." A-7. The second statement by a decision maker was the letter from Carol Webb, OBI's President, notifying Mr. Medlock that he was being discharged because "you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management. . . . " A-7.

The evidence of retaliation which Mr. Medlock presented here was sufficient to trigger the mixed-motive proof scheme, as interpreted by the majority of the circuit courts. In addition, Mr. Medlocks' evidence of retaliation was also sufficient to trigger the mixed-motive proof scheme, as more narrowly interpreted by the minority of the circuit courts. Because Mr. Medlock's evidence was sufficient to trigger the mixed-motive proof scheme under either of the interpretations of *Price Waterhouse*, the instant case does not present an appropriate opportunity for resolving the disagreement.

III. The Question Concerning The Extension Of The After-Acquired Evidence Rule Set Forth In *McKennon v. Nashville Banner Publ'g Co.* Is Not Important Enough To Warrant Review.

OBI requests that this court grant certiorari to determine whether the after-acquired evidence rule set forth in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) should be extended to apply to evidence regarding post-termination misconduct, even when that misconduct may have resulted from a discriminatory or retaliatory

termination. This question is not important enough to warrant plenary review by the Court for two reasons.

First, the Tenth Circuit's opinion in this case is the only circuit court decision addressing the question of whether the after-acquired evidence rule should be extended to post-termination conduct. This demonstrates that the question does not frequently arise, and is not of general importance. In addition, the after-acquired evidence rule adopted in *McKennon* is relatively new, and a consensus among the lower courts may emerge over time.

Second, the Tenth Circuit in this case did not adopt a rigid rule, foreclosing the application of the *McKennon* rule to post-termination conduct in all cases. The Tenth Circuit specifically stated:

> Although we do not foreclose the possibility that in appropriate circumstances the logic of *McKennon* may permit certain limitations on relief based on post-termination conduct, . . . we cannot conclude that the district court abused its discretion in refusing to adopt defendant's proffered instruction.

A-19. Thus, the Tenth Circuit simply held that under the particular facts of this case, the *McKennon* rule was not applicable to Mr. Medlock's post-termination conduct. Such a fact-specific ruling is not important enough to warrant granting certiorari.

CONCLUSION

For the reasons discussed above, OBI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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